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No. 80-56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LORAIN, A DIVISION OF KOEHRING COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. This Court has recently granted a writ of certiorari to review the decision in *Complete Auto Transit, Inc.* v. *Reis,* No. 79-1777. The question presented in that case is identical to one of the questions presented by the instant Petition. Thus, both cases squarely raise the issue of whether individual employees may be held liable for damages when they engage in an admittedly unlawful wildcat strike where the union is shown not to be liable. *See* Pet. 2-3 (Questions Presented C and D); 14-16.

2. In the Opposition to the Petition, Respondents appear to contend that Petitioner did not seek relief against individual employees for their participation in the unlawful strike. *See* Opposition to Petition at 8-9 and n.12. This is absolutely incorrect. Petitioner proceeded against the Union, as an entity, and the individual striking employees *alternatively,* and it did so in both lower courts.

Plaintiff's position in the District Court may be easily seen at page 13 of the Appendix to the Petition. There, in its Memorandum Decision dismissing the claim against the individual strikers, the District Court specifically noted Petitioner's position on this question:

> "The plaintiff [Petitioner], however, distinguishes *Atkinson* by arguing that if liability cannot be found to lie against the defendant unions because the individual defendants acted in their personal and non-union capacity in breaching the collective bargaining agreement, then, under such circumstances, the individual defendants could be held personally liable for the damages suffered as a result of the breach. In *Atkinson,* it is noted the Supreme Court specifically reserved ruling on whether there can exist individual liability where the union is held not responsible for the breach of the collective bargaining agreement. *See Atkinson* v. *Sinclair Refining Company,* 8 L.Ed. 2d at 471, n.7."

The District Court disagreed and held that an action against individual strikers could not lie, even if the union itself were not responsible for the admittedly unlawful strike. In so holding, it specifically relied upon the Seventh Circuit's decision in *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers,* 452 F.2d

49 (7th Cir. 1971). *See Pet. App.,* A-14-15. This is precisely the same authority relied upon by the Sixth Circuit in *Complete Auto Transit, Inc.* v. *Reis,* 614 F.2d 1110 (1980).

Petitioner also raised this question in the Court of Appeals. *See* Petitioners' Brief in Court of Appeals at 34-36. Nevertheless, the Court of Appeals affirmed the District Court's decision, "for the reasons given by the District Judge . . . ."

Thus, contrary to Respondents, the issue of individual liability is clearly before the Court in this case. As noted, this is the same issue raised by *Complete Auto Transit.* This Court should accordingly grant the writ and schedule this case for argument and, possibly, for decision with *Complete Auto Transit.*

3. Respondents also attempt to characterize the other issue in this case as one revolving in a "unique" collective bargaining contract, "involv[ing] nothing of general applicability." Opp. at 1. This, too, is simply incorrect. The contract involved specifically provided for the Union to "actively . . . endeavor . . . to terminate" any illegal strike. The District Court found a breach in this regard, holding that the Union failed to satisfy this affirmative duty. Pet. App., A-27. The District Court also found, *id.,* that the Union ratified the unlawful strike in much the same manner as did the First Circuit in *Latas Libby's, Inc.* v. *Steelworkers,* 609 F.2d 29 (1979).

The Court of Appeals held that the ratification finding was clearly erroneous. In addition, it went on to hold that damages could not be recovered for the Union's failure to use its best efforts to terminate the

strike, despite its express contractual undertaking to do so. It reasoned that since the contract provided against liability for a *work stoppage* that was not "authorized, supported, encouraged or ratified" by the Union, a breach of the affirmative obligation to terminate a strike could not result in damages. While the Court of Appeals' decision may be seen as patently incorrect in this regard, it also strikes at the very heart and purposes of Section 301 of the Act, 29 U.S.C. § 185. Obviously, a contract provision precluding liability for an unauthorized strike does nothing to prevent recovery for the breach of another provision calling for the Union to use its resources to terminate that strike. The Court of Appeals' decision seems to say that an affirmative "best efforts" undertaking by a union is utterly meaningless unless the contract also provides a specific remedy for its breach. Certainly this goes far beyond this Court's holding in *Carbon Fuel Co.* v. *United Mine Workers,* 444 U.S. 212 (1979). Moreover, if such a holding were to become part of our substantive federal labor law, it would require the parties to the collective bargaining process to incorporate in their agreements a particular remedy for the breach of each particular undertaking.

4. Contrary to Respondents' contention, there is indeed a conflict within the Circuits that can be resolved by a decision in this case. The Court of Appeals in this case expressly disavowed the Third Circuit's decision in *Eazor Express, Inc.* v. *Teamsters,* 520 F.2d 951 (1975), apparently even on the question of whether the courts will enforce an express "best efforts" undertaking on the part of a union.

5. It is therefore submitted that certiorari should be granted on each of the issues in this case. At a minimum, the writ should be granted on the question of individual liability which is now before this Court in *Complete Auto Transit.* Otherwise, Petitioner will have suffered damages from an admittedly unlawful strike while, at the same time, being denied any recovery for it. It is submitted that federal labor law contemplates no such result, and this Court should now so hold.

Respectfully submitted,

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